In The

Supreme Court of the United States

October Term, 1923.

No. 212.

WILLIAM LUCKING,

Plaintiff and Appellant,

v.

DETROIT & CLEVELAND NAVIGATION COMPANY,

Defendant and Appellee.

BRIEF FOR APPELLEE.

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SUBJECT INDEX.

CASES CITED.

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THE QUESTION INVOLVED.

Was the defendant in March, 1921, forbidden by law to cease operating its steamers on the route between Detroit and Mackinac Island, Michigan, while continuing to operate steamers on a route between Detroit and Cleveland, Ohio, and on a route between Detroit and Buffalo, New York?

It is not claimed, and cannot be claimed, that any of the cities touched by the steamers on the Detroit and Mackinac

route are without railroad service, or that plaintiff is without public service by water or by rail and water, between Detroit and Mackinac during the navigation season (Opinion Cir. Ct. of App., Tr., 22, at top).

STATEMENT OF THE CASE.

The question stated arises out of a bill filed in March, 1921, in the District Court for the Eastern District of Michigan in Equity. In the bill the plaintiff alleges that early in January, 1921, the public press stated that the defendant intended to discontinue the operation of its steamers in the ensuing season of navigation over the Detroit and Mackinac route which it had for a long time operated thereon (Tr., 4, Secs. 8 and 10 of the bill); that in February, 1921, plaintiff applied to the Interstate Commerce Commission for relief by petition similar to his bill, and that his application was denied (Tr., 6; Sec. (13) of bill).

The bill prays for a mandatory injunction to compel the defendant to fit out two of its steamers and to operate its vessels over the route aforesaid during the navigation season of 1921.

The court dismissed the bill and refused to grant a rehearing. The plaintiff removed the cause to the Circuit Court of Appeals for the Sixth Circuit. That court affirmed the decree of the District Court (Tr., 19).

The opinions of the District Court are set out on pages 11 and 17, and that of the Court of Appeals on page 19 of the Transcript. The case was then brought to this court.

In substance the bill sets out that the defendant is a corporation organized under the laws of the State of Michigan and quotes from its Articles of Association the statement of the purpose for which it was organized; alleges that it is a common carrier for hire and has long operated steamers between Detroit and Cleveland, Ohio, steamers between Detroit and Buffalo, New York, and steamers between Detroit and Mackinac Island, Michigan; and that it proposes to operate steamers on the first two named routes in the season of 1921; that by arrangement with rail carriers it has been engaged, under joint lake and rail tariffs, in continuous transportation of passengers and property, partly by rail and partly by water, from various ports on the routes reached by its steamers to and from various points on the railroads of said rail carriers; that it has long operated steamers on the route between Detroit and Mackinac Island; that its business as a whole has been profitable; alleges, *upon information and belief,* that it has made large profits from operating the Mackinac route; that if the operations from such route have resulted in a loss, its business as a whole has made a profit; that plaintiff has been, and desires to become, a passenger on its steamers used on the Mackinac route; that defendant threatens not to operate steamers on that route in the navigation season of 1921, and that it is defendant's duty to operate its steamers on said route in said season.

It is to be noted that defendant is not, itself a carrier by rail, nor is it alleged so to be in the bill. It carried persons and property by water and in some cases under joint tariff rules and arrangements with rail carriers (Opinion Court of Appeals, Tr., 24, line 34).

The defendant answered this bill fully under oath and joined with its answer a motion to dismiss. It admitted

that it intended to discontinue the operation of its two steamers over the Mackinac route, and stated the reasons why it so intended, in paragraphs 6 and 10 of its answer (Tr., 9, 10).

In the plaintiff's brief it is said several times (for example, on pages 4 and 6), that defendant "arbitrarily" has ceased to operate over this route, and (on page 36) that this was done for mere "whim and caprice," and (on page 31) that its action was "as arbitrary as it was abrupt."

The word "arbitrarily," and the words "whim and caprice," are, it is submitted, hardly applicable when the allegations of the bill on information and belief are compared with the sworn averments in the answer above referred to.

As to the word "abrupt," the plaintiff in his bill claims that authorized statements appeared in the public press early in January, 1921, within a few weeks after the season of navigation of 1920 closed and some months before the ordinary opening of navigation in 1921, that defendant did not intend to operate steamers on the Mackinac route during the season of 1921.

It is said (Brief, page 2) that defendant took the position in the lower courts that "being a carrier by water, it owed the public no duty whatever." It is a mistake to suppose that the defendant took the position in any court that it owed the public no duty whatever. It did contend in the lower courts, as it contends here, that it had the right to abandon the operation of its steamers on the Mackinac route in the season of navigation of 1921.

It is apparent that the Court of Appeals, in its opinion, has aptly stated the question in the case as follows:

> "The sole question before us is whether, either by common law or by statute (Federal or State) defendant is forbidden to cease or suspend navigation over a given route which it has previously operated, because such cessation entails inconvenience or hardship upon the public previously served by such utility."

The question thus stated by the Court of Appeals involves the consideration of these points:

Was the defendant under a duty to maintain service on the Mackinac route imposed

(1) by any statute of the State of Michigan;

(2) by any common law principle;

(3) by any Federal statute?

Our contention is that no duty is imposed upon it by any statute or by the common law.

ARGUMENT.

I.

No Duty is Imposed On the Defendant By Any Michigan Statute to Maintain Service On the Route.

1. No such duty is imposed by the statute under which the defendant is organized.

Defendant is organized under the Act of 1867 commonly called the Commerce and Navigation Act, being Chapter 181 of the Compiled Laws of 1897, Volume 2, page 2154, entitled "An Act to authorize the formation of corporations for the purpose of engaging in commerce and navigation."

The Act provides, Section 2, that by compliance with its provisions persons may become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes or other navigable waters, natural or artificial, connecting therewith."

This statute was superseded by the general incorporation Act of Michigan of 1903, Act 232, Public Acts of 1903, Compiled Laws of 1915, Chapter 175, under which vessel companies have since been organized. The Act of 1903

contains a saving clause as to rights which had accrued under the Act of 1867.

Under the Act of 1867 and under that of 1903 a vessel company is given no right to navigate any particular waters of the Great Lakes, and no duty is imposed upon it to navigate any particular waters.

The Act permits those who associate to become a body corporate, but it in no manner attempts to direct how or where the corporation shall conduct its business of maritime commerce.

The defendant's Articles of Association contain the following:

> "Art. I: This corporation is formed for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes, natural or artificial, connected therewith, and for acquiring, owning, holding and disposing of every kind of real and personal property, or estate, whatsoever, which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

These Articles, which constitute the Company's charter, contain no designation or mention of the route over which navigation was to be carried on. The statute did not require any such designation. The corporation is given no power except the power to be a corporation which an individual vessel owner does not have. The corporation may do nothing more in the way of conducting its business than an individual owner, or partnership owners, may do in operating a vessel. The only difference between a partnership operating a vessel and a corporation organized under this Act operating a vessel, is that the owners of

stock in the corporation risk in the enterprise, not their whole credit or property, but only their investment in the stock.

A vessel company gets no more privileges from the State than does a manufacturing company; indeed, as has been stated, for many years vessel companies have been organized under the general Act relative to manufacturing companies. A vessel corporation is given no power of eminent domain; no power to build or remove bridges or wharves; no powers of like kind, such as are conferred by law upon a corporation organized to operate a railroad or a telephone or telegraph line. No duty is imposed upon a vessel corporation to fix or maintain any particular route, as is the case with a railroad company.

All that is given by the statute is the power to become a corporation, the same power that is given to a manufacturing company or to a mutual benefit society. As Judge Tuttle, in the District Court, has said:

> "The reasons, however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain. It has no private right-of-way or special facilities for acquiring means of access by its vessels to docks or wharves, but must use the open sea as its highway and depend, for the proper maintenance of its vessel and equipment, upon such arrangements as it may be able to make by private contract, like any other private citizen. In the eyes of the law it occupies no different position than that

of a common carrier operating taxicabs or other vehicles upon land, and it is under no greater obligation than is the common carrier last mentioned, so far as the continued operation of its lines is concerned" (Tr., 15).

So far as the statute under which it is organized is concerned, no duty rests upon the defendant to maintain service on the Mackinac route.

2. The Michigan tonnage tax, so-called, does not impose any such duty.

The plaintiff, on pages 29 and 30 of his brief, dwells upon this Act, as if it did impose the duty alleged by him to exist.

In 1911 a statute was adopted in Michigan, providing that steam vessels engaged in carrying passengers and freight and employed in navigation of the Great Lakes should be taxed, not locally, but by paying to the State a tax of 20 cents a ton on the registered tonnage of the vessel. In this way the situs of vessel property for taxation was settled. The Act is general in its application, including individual owners, partnership owners and corporate owners. There is nothing in it bearing upon the discontinuance by an owner of the operation of a particular route, and such is the conclusion of the Court of Appeals (Tr., 24).

3. The Railroad Commission Act, 2 Compiled Laws of 1915, page 2906, does not control a vessel company. The definitions of "common carrier" and "transportation" in Sections 3 (a) and 3 (b), Section 8111, show that it was not the legislative purpose that the Act should apply to

vessel companies engaged in maritime commerce and navigation.

There is in the Act nothing which expressly or by implication forbids a corporation to which it does apply from ceasing to operate a line.

The language of Section 4 of the Act, in view of the definition of "common carrier" earlier given, plainly does not refer to vessel companies, nor does it require that the carrier subject to the Act must forever furnish service, but requires only that so long as it does furnish service, the service must be reasonably adequate, and for a reasonable charge.

4. Act No. 56 of the Public Acts of 1917 does not affect this case. The Act provides that "no person, firm or corporation owning or operating any railroad shall abandon its main line of track, or any portion thereof, without the permission of the State Railroad Commission." It has no reference to vessel companies.

The Court of Appeals remarks:

> "It is significant that this statute contains no mention whatever of common carriers by water and discloses, we think, an express legislative intent not to include them" (Tr., 25).

The statute is substantially like the provision in the Federal Transportation Act of 1920, which now stands as subsection 18 of section 1 of the Interstate Commerce Act, which is discussed here in another connection.

5. Act No. 246 of the Public Acts of 1921 became operative after the bill in this case was filed. The Act gives the Michigan Public Utilities Commission power to regu-

late the service rates, fares and charges, rules and regulations of carriers by water within the State, and to hear complaints and make orders thereon. This statute obviously confers no power on the courts under such a bill as this, as is pointed out by the Court of Appeals (Tr., 25).

II.

No Duty is Imposed On the Defendant By Any Common Law Principle to Maintain Service On the Route.

1. No decided case has been found by either party, nor by the Court of Appeals, in which it has been held that a common law duty exists, such as is here contended for by plaintiff.

The individual owner who operates his vessel in maritime commerce may become a common carrier, for hire, of freight and passengers. He may thus become subject to the public regulation of his business practices and his charges for services; so may a partnership; so may a corporation.

The individual, partnership and corporation may navigate with vessels public waters—one as freely as the other.

It was not uncommon in former years for a man to own vessels which for a considerable time were run on a particular route on the Great Lakes and to become a common carrier on that route. See for example:

Wright v. Caldwell, 3 Mich., 51.
McKee v. Owen, 15 Mich., 115.
Laffrey v. Grummond, 74 Mich., 186.

for instances of this kind.

Had such an individual ceased to operate a line which had thus been operated between ports on the Great Lakes, he could not have been compelled against his will to continue to operate the line.

Judge Tuttle, in the District Court, said, correctly:

> "It has never been supposed, and could not seriously be contended, that every person who engages in the business of transportation as a common carrier is obliged to continue in such business indefinitely and may be restrained by injunction from abandoning such of its routes as it may wish to discontinue.
>
> The mere fact, then, that the defendant is a common carrier does not subject it to the duty to continue the operation of its vessels over any or all of its routes of transportation. As, therefore, it does not appear that the defendant is a public or quasi-public corporation, or exercises any powers or rights from which flow the duty in question, I am unable to find in the common law any basis or warrant for the coercive order sought, and I am clearly of the opinion that in the absence of some statutory provision applicable the plaintiff is not entitled to the relief prayed" (Tr., 15, 16).

The Circuit Court of Appeals in this connection used the following language:

> "In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we are advised, had any relation to navigation companies. So far

as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant'' (Tr., 22-24).

So long as the respondent continues to operate a line, it is, it is true, obliged to furnish on such line reasonable service in transportation for passengers and freight. No question is involved here of the reasonableness of the service on any route which was operated by respondent when this suit was instituted. The duty of reasonable service upon operated lines is not a duty to continue service upon a line which respondent has ceased to operate.

The fact that respondent is a corporation does not impose upon it a duty to maintain its service, if it wishes to discontinue it. In this regard it is in no different position from an individual carrier. (See discussion under Point I above.)

It is not obliged at common law to maintain service on the Mackinac route under the circumstances existing here.

2. The appellant in his brief argues that common carriers are often compelled to operate branch lines where a public necessity appears, and therefore that the defendant may not abandon service on the Mackinac route.

All of the decided cases cited by him in this connection are cases of railroad companies. The decisions upon which apparently the appellant mainly relies are:

Chesapeake & Ohio R. R. Co. v. Commission, 242 U. S., 603.
Gasser v. Railroad Co., 205 Mich., 5.
Hocking Valley Co. v. Commission, 92 Oh. St., 9.
Bryan v. L. & N. R. R. Co., 244 Fed., 650.

The *Chesapeake & Ohio Company case* was an appeal from the judgment of a state court affirming an order of the state commission which required the railroad company to furnish passenger service on a branch line used theretofore only for transporting freight. The state court affirmed the order of the Commission, and held that the branch line was an integral part of the railway system and was, therefore, devoted to the transportation of passengers as well as of freight. This court held that the order, instead of enlarging the public purpose to which the line was devoted, only prevented a part of that purpose from being neglected, since it had always been a statutory duty to transport persons over the branch line. The case was decided, not because of any provision in the Interstate Commerce Act, but because under the state statutes a duty to carry passengers was held to rest upon the railroad company.

The case of course, is not an authority for holding that a common law duty rests upon the defendant to furnish such service, nor indeed that any statute whatever com-

pels the defendant here, on the facts involved, to furnish the service sought.

In *Gasser v. Railroad Co.*, the defendant sought to abandon its entire line. Such abandonment would have deprived a village and the surrounding country of any connection with any railroad whatever. The railroad company, by its articles, had fixed a particular route, and its only route, and it entered upon its duties as a railroad carrier. It was held that without the consent of the State it could not thus discontinue the duty which it had assumed under the Railroad Act.

The rule thus laid down in the case is now substantially embodied in the statutes of Michigan. This decision has no appreciable bearing upon the case of a Michigan vessel company ceasing to operate a particular route.

The *Hocking Valley case* was decided as it was because of the peculiar franchises, rights and privileges granted to railroad and interurban railroad companies under the laws of Ohio.

From the language used near the end of the opinion, it is apparent that even railroad companies may, under some circumstances, properly discontinue the operation of a branch line.

In the *Bryan case* the question was whether a railroad company could change its route to a location several miles from its original location.

It was not denied that, except for subsequent legislative action, the railroad company might not relocate its line, which was originally located under a special charter granted

in 1854 for the construction of a line between two cities in the State and passing through a third.

We are not here concerned with the rule applicable to railroad companies whose lines are determined by the charters granted to them or by the maps of their routes which they file when organized under the general law.

All the cases cited by the appellant are found to be cases turning upon the rights and duties of railroad companies under the statutes of different States. No one of them is such a case as is here involved of a corporation organized under an Act like the Michigan Commerce and Navigation Act, with Articles of Association such as those of the defendant. Nor, as has been said, is the plaintiff without public service by water, or by rail and water, between Detroit and Mackinac.

The attention of the court is called to the analysis of these cases set out in a foot note to the opinion on page 23 of the transcript, and to the apt language of the Court of Appeals on the page which has been quoted by us hereinabove.

3. Plaintiff makes a further argument in support of the proposition that the defendant is not relieved from its duty to afford the public the necessary service because it enjoys no right of eminent domain. He quotes on pages 24 and 25 of his brief from the opinion of the District Court and from the opinion of the Circuit Court of Appeals, and urges that what those courts have held in this regard is at variance with the decision of this court in *Central Transportation Company v. Pullman's Company, 139 U. S., 24.* In this case the purpose of the plaintiff's incorporation as stated was the "transportation of passengers in railroad

cars constructed and owned by said railroad company." The plaintiff had leased all its cars and patents to defendants for ninety-nine years and covenanted not to engage in the business of manufacturing, using or hiring cars while the contract was in effect. It thus disabled itself from performing any duty to anyone with its property. After the termination of this lease, an action was brought by it on the lease to recover rental payments. The court held that the lease was *ultra vires* and that no recovery could be had.

That the question here involved is entirely diffierent from that passed upon in the *Central Transportation case,* appears from the quotation of the opinion of Justice Gray, as follows:

> "Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendants nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties" (pages 52, 53).

The present case is obviously totally unlike the *Central Transportation case.* There is here no question of *ultra vires.* No duty rests to transport passengers at all upon

a corporation organized under the Act of 1867, or under the respondent's Articles of Association, above quoted. What it has done in no sense disables it from transporting passengers and freight upon the Great Lakes, nor even upon its Mackinac route, if circumstances hereafter seem to warrant such course. The bill distinctly avers that it is engaged in performing its duties as a common carrier upon other routes of the Great Lakes.

The fact that the Central Transportation Company which did not possess any power of eminent domain, was, under its charter conducting a business "affected with a public interest," was held to render it impossible for it to recover on a contract which totally disabled it from carrying out the business for which it was chartered. In that case there is nothing to indicate that a vessel company is bound forever to operate one of its lines which it has found it desirable to discontinue.

In the foot note to the opinion in the Court of Appeals above alluded to on page 23, after analyzing this case, the court remarks:

> "Plainly this decision is not opposed to the conclusion we have announced above."

In this general connection further the plaintiff cites *International Bridge Company v. New York, 254 U. S., 126,* to show that a permissive charter, so-called, does not excuse from performance by a carrier its duties to the public. The case holds that after the corporation had been consolidated with a Canadian corporation, it was subjected to the *duty* to operate under the terms of the Canadian charter, and that the Canadian charter imposed a duty to do what the State of New York sought to compel it to do in the construction of a foot-way and carriage-way.

It is not apparent how this decision bears upon the controversy here involved. It can hardly be urged as a ruling that a common law duty exists not to cease operation of the Mackinac route.

III.

No Statute of the United States Forbids Defendant to Cease Operating the Route.

Plaintiff seems to rely, in the main, on such statute.

There is no claim on the part of the plaintiff that the Shipping Board Act forbids it.

In the lower court, as well as in this court, it is argued that the Interstate Commerce Act forbids the defendant to discontinue the service.

An examination of the Act will show that this position is not well taken.

1. Section (1) provides that the Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement for continuous carriage or shipment.

Defendant is not alleged to be, and is not, a carrier wholly by railroad, nor is it a rail carrier at all, "except in the sense that it carried by water under joint tariffs with rail carriers" (Tr., 24) some through rail and lake business.

Appellant claims that under the decision of this court defendant is as specifically within the terms of the Commerce Act as any other carrier named therein (Brief, page 10). In making this claim, it relies upon the case of *Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194.* That case, however, does not warrant the conclusion drawn from it by appellant. The question raised in it was whether a steamship company which operated under joint tariffs made by it and connecting railroad companies covering interestate transportation, was obliged to obey the regulations of the Commission relative to its system of accounting and reports. It was held that the steamship company was obliged to comply with the regulation of the commission as regarded the filing of tariffs and reports and the following of a method of accounting. For that purpose such water carriers were held to be "as specifically within the terms of the Act as any other carrier named therein," but it was not held, and has never been held, that water carriers were generally within the operation of the Act and under the control of the commission (see note to Court of Appeals' Opinion, Tr., 23). The general supervision of water carriers is committed to the Shipping Board, created by the Act of 1916. The control of the Interstate Commission is limited to the matter of tariffs, accounts and reports. The defendant is not specifically within the terms of the Interstate Commerce Act except in respect to such matters.

2. Section (3) of the Act contains certain definitions and Section (4) requires carriers, subject to the Act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefore.

Appellant contends that these provisions apply to a lake carrier and compel it to furnish adequate facilities, and cites *Alaska Steamship Company v. International Union, 236 Federal, 964.* In that case it appears that the vessels of the company were engaged in interstate commerce and carried United States mail. Strikers were interfering with the loading of the vessels. The District Court enjoined such interference, holding that the defendants were conspiring to prevent the carrying on of the business of interstate commerce and the carrying of mail, and that the Act required the plaintiff to furnish all reasonable facilities for receiving, forwarding and delivering persons and property. The point of the decision is that if the company desired to continue its service it was entitled to ask the court to restrain unlawful and violent interference with its continuance. The case plainly does not hold that the company was under any duty to continue its service on a particular route if it desired to discontinue it. It is no authority for the position taken by the plaintiff here, nor does it in the slightest tend to show that the Commerce Act forbids the cessation of service on the Mackinac route.

The language of Section (4) as now amended in 1920, does not add to the duties of a carrier as they existed before the last amendment (Opinion of the District Court, Tr., 17, 18. Opinion of the Court of Appeals, 24).

Certainly a duty to furnish transportation on reasonable request, if a carrier is engaged in the transportation of passengers or property, is not a duty under the language of the Act, to continue indefinitely to engage in such transportation on a particular route like the Mackinac route.

So long as a vessel owner continues to act as a common carrier on a particular route, he owes certain duties

to the public, either statutory or common law duties; he is bound to treat people without discrimination; he is bound to furnish transportation on reasonable request; but this statute certainly does not compel defendant to continue to operate a particular line (see discussion in opinions of courts below; Tr., 17, 18 and 24). Epecially is this true if the vessel owner advises the public that he does not propose to continue operation of the route several months before the season of navigation on the Great Lakes opens.

3. That the Interstate Commerce Act has no application to the situation here involved, is put beyond question by subsection 18 of Section (1) the Interstate Commerce Act as amended by Sec. 402 of the Transportation Act adopted by Congress in 1920 (41 Statute at Large, 456, 477). That enactment now forbids a railroad carrier subject to the Act to abandon an existing line of transportation without the approval of the Interstate Commission. The phrase used in the section is not "*Any* carrier subject to the Act," found in several other places in the Act, but "a carrier by *railroad* subject to this Act."

Congress has here legislated, and recently, upon the subject of abandonment of existing lines of transportation. In so doing, it has expressly imposed the limitations created only upon railroad carriers. The express imposition of this limitation upon railroad carriers evidences an intent to exclude from the burden thereof every other common carrier subject to the Act, and therefore the defendant. The case is within the maxim: "*Inclusio unius, exclusio alterius.*"

From this language, as the Court of Appeals says:

> "Any implication of such inhibition (i. e. on dis-

continuing service on the Mackinac route) is to our minds plainly repelled by subsection 18 of the Amended Act. * * * We have no doubt the Interstate Commerce Commission rightly disclaimed jurisdiction to act in the premises upon plaintiff's request."

So far as observed, the plaintiff's counsel nowhere in his elaborate brief discusses the effect upon this case of Section 18 above considered.

We submit, therefore, that no statute of the United States forbids the defendant to discontinue the operation of the Mackinac route.

IV.

CONCLUSION.

In conclusion, we respectfully submit that the foregoing considerations show:

1. That the duty claimed by plaintiff to exist must arise from a statute or from a common law principle.

2. That no statute imposes, nor does any common law principle impose, such duty upon the defendant, a Michigan corporation organized under the Commerce and Navigation Act.

3. That this corporation is not under any duty to continue to operate its vessels upon every route upon which it has operated them in the past, there being no statute and no common law principle imposing such duty.

4. That plaintiff is seeking, without legal justification, to extend to this corporation statutes or common law principles applicable to railroad corporations, and that in so seeking he is overlooking the essential difference in the privileges granted and the duties imposed by law upon the two different kinds of corporations.

5. That the judgment of the court below should be affirmed.

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